IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF STATUS CONFERENCE VIA ZOOM PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

FEBRUARY 2, 2021

11:01 A.M.

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; February 2, 2021.)

THE COURT: All right. Morning, all.

All right. Harry, do you want to call the case?

COURTROOM DEPUTY CLERK: Yes, ma'am. We're here for the status conference in the case of Curling vs. Raffensperger, Civil Action Number 17-CV-2989.

Since we do have quite a few people on here, if just the primary speaker for the Curling plaintiffs would identify yourself for the record.

MR. CROSS: Morning, Your Honor. This is David Cross.

COURTROOM DEPUTY CLERK: Thank you.

Coalition?

MR. BROWN: Bruce Brown.

COURTROOM DEPUTY CLERK: Thank you, sir.

State of Georgia?

MR. TYSON: Yes. Good morning. Bryan Tyson.

COURTROOM DEPUTY CLERK: Okay. Thank you, sir.

Fulton County?

Okay. Who else is on that I missed?

MR. MILLER: Your Honor, Carey Miller, Vincent Russo, Josh Belinfante. Mr. Tyson will be handling this for the State defendants.

COURTROOM DEPUTY CLERK: Thank you very much.

Judge?

THE COURT: Thank you.

All right. So this is sort of a Shakespearean play within the play. I realize in sending you the order and asking you about the hearing that at this juncture I don't necessarily have a credibility dispute. So I want to make sure that you understand that I perceive that. But, you know, we may have disputes. We really just dealt with affidavits in the past regarding -- regarding the named plaintiffs.

So I guess the overall thrust of what I was trying to communicate in the order was there is a way at very minimum to address the plaintiffs' concern expressed in the submission that certifying the order from the motion to dismiss is truncated and doesn't really reflect the state of the record.

That doesn't -- you know, for me to do this pause in this way doesn't necessarily obviously address the plaintiffs' concern that they want to get on with things.

On the other hand, you know, it does allow me to address potentially the state of the record now. Whether I certify a different order that I issue now or not is a whole other matter. But that -- and I didn't know necessarily what evidence might be introduced as to standing at this juncture.

But just reviewing the cases, it just seemed we're not -- it is true that we're not at this point at the -- in reality solely in terms of the record at the point of a motion

to dismiss.

So that is what it was focused on. So with that in mind, maybe I could hear first from plaintiffs who are the most vigorous about saying this is not necessary. But on the other hand, we have some other views in light of what I have said.

MR. BROWN: Your Honor, this is Bruce Brown. The Curling and Coalition teams have discussed this matter together and, frankly, are trying to address the Court's concerns and also looking towards a trial on the merits.

Based upon what we know and the research that we have conducted on the cases, including the most recent cases, our position is that the standing issues need not and should not be severed from the trial on the merits and that the certification of the motion to dismiss also would not be effective.

And I think our general approach is that we fully understand that if the standing issue was adjudicated in a way that allowed for appellate review prior to the trial on the merits that there would potentially be some savings. But we do not believe that at the end of the day that that will really work.

And the reason for that, just to explain in a little bit greater detail, is that the -- the motion to dismiss, as we explained in our papers, treats the standing issue on the pleadings frozen in time quite awhile ago. Since then, a lot has happened. So it doesn't provide a very good avenue for

either appellate review or certainty if we go forward from that that a trial on the merits would have -- would have all the certainty that we would like.

The current appeals that are before the Eleventh Circuit also will address standing. But they will deal with -- but standing is claim specific. And the current appeals only deal with two -- the current appeal -- excuse me -- only deal with two issues that seek to -- on the Coalition's claims. They don't address any of the Curling's claims. And it doesn't address the broader BMD issue of whether or not the BMDs are a violation of the Fourteenth Amendment. And so that is also not going to tell us too much about standing, as it were.

The third option is the option suggested by Your Honor in your order. And that is to in a sense have a pretrial or to sever the standing issue in a separate, full evidentiary hearing. That would have the advantage over certifying the motion to dismiss, that it would be both horizontally -- and the appeal because it would be horizontally broad enough to cover all of the issues in the case and it would not face sort of the anachronisms that you would have with the record frozen in time with the other appeals.

However, although those are advantages, we pretty strongly believe that that is not -- that will not be effective or practical. There's two reasons for that. One is that -- and I think David Cross can explain this better than I can.

But the issues -- the standing issues in our case are intertwined with the facts on the merits a way that makes pretrying that problematic. And the case that you cited, Your Honor, the 2000 case from the Eleventh Circuit quoted another case, which is called *Barrett Computer Services*, a Fifth Circuit case from 1989. And *Barrett* goes into why you don't want to sever or explains how you don't want to sever standing when it is intertwined with the merits. And it in turn quotes Supreme Court cases *Gwaltney* and *SCRAP* and *Wright Miller & Cooper* to this effect -- and it says, because it would be impossible to prove the injuries alleged for purposes of establishing standing without also addressing the merits, a preliminary hearing of the type available in disposing of a motion to dismiss would not offer an appropriate forum for evaluating the issues. In fact, this type of intertwining of the merits and the jurisdictional issues has led some commentators to, quote, conclude there is little to be gained by preliminary factual inquiry to some issues of standing.

And we think -- we think that is this kind of case.

THE COURT: Why would that be so when I have -- in this type of case where I've had, I guess all told, at least two and a half days of an evidentiary hearing, which in some circumstances might be a full trial? But -- and those issues deeply went into -- address the -- both the BMD issues, even though there was more to be done, and obviously some of the

issues surrounding absentee ballot, scanners, et cetera?

What would you -- you know, under the best of circumstances I guess is what I'm saying, just sort of almost looking at it from the perspective almost of the summary judgment, you know, standard where I consider all of the evidence that has been provided and that might be provided in the future in the light most favorable to the plaintiffs, tell me -- but I also -- which I might or might not. But, you know -- and obviously I already have made some findings on the current record.

Tell me how that would translate into particularized harm and how will it help me in that regard. I mean, I have just basically proceeded based on the premises found -- and the legal analysis found in the motion -- the order on the motion to dismiss.

But I'm not clear why would it not allow me to -- that while you couldn't establish enough so that I can feel some comfort level that I really actually before we do something that has great public import and have also enormous amount of resources that we're not just simply chasing after something that is not just -- may not materialize or likely is not going to materialize.

MR. BROWN: The plaintiffs are very comfortable with the record on standing, both the pleadings -- both at the pleading stage and at the preliminary injunction stage. And we

have looked at these current -- the more recent Eleventh Circuit cases, and we don't see anything in the Eleventh Circuit cases that would cause a reevaluation of your own analysis of standing in your most recent order on the preliminary injunction. We don't see it.

And the Eleventh Circuit cases that did balance Lin Wood's cases on standing and the others, they don't weigh any of the Eleventh Circuit cases or establish standing doctrine of Anderson-Burdick in a way that we're -- we are concerned enough about standing such that we would not want to go ahead and proceed to trial.

Our view is that interrupting the course of the litigation to take up standing separately has enormous cost not only to time but also to effort. And it is unlikely for a number of different reasons to yield that much more certainty because a separate proceeding on standing, even if it were certified by the Court, may not be taken by the Eleventh Circuit.

If it goes up before a trial on the merits, there will be arguments both ways that the factual record is insufficient for either from the defendants' standpoint or the plaintiffs' standpoint. And so we may not even have the standing issue even if it were pretried presented in such a way that it could get a clear answer.

And further proceedings on standing likely would be,

Your Honor, just as long as a trial on the merits. And our strong preference would be to go with one of the two schedules or some blend of the two schedules that were presented to the Court and march through to a trial on the merits.

The effort involved both from the plaintiffs' perspective and from our clients' perspective is that anything that can -- anything that will prolong the case is at risk. There is a run rate of effort. And so it is not just trying a case. It is month after month after month.

And this case, if and when we win, Your Honor -- we would like to be optimistic. But if we do win, it will be appealed -- the standing issues and everything else. That is going to be slow and costly enough.

And for the plaintiffs and their organizations to be able to sustain this level of litigation, as hard as it is already, quite frankly, would be more difficult if we have to before trying the case go up and down on appeal.

So that is sort of our deal.

David, you might have more particular examples of some of the more complex issues.

MR. CROSS: Your Honor, to your question what would be the particularized harm if the facts were sort of looked at under a summary judgment standard, I'll give you one example. A primary point that they make -- the defendants make in their briefing on the motion to dismiss -- and we see this at the

appellate level too. But a primary argument they make is that there is no harm to our clients because our clients can verify their ballot. They can go into the BMD. They can look. They can make their selections, print the ballot, and review the ballot. Even if we put aside all the science on the degree to which voters can actually do that, particularly with these really long, complex ballots, it ignores the reality that in Georgia there are QR codes. And the QR codes are what gets scanned.

So it cannot be that any voter, our clients included, can actually verify their ballot. The moment at which they cast it they have no idea what is actually going to get counted for their ballot.

Now, the State's response to that is that, oh, but we're going to come in and we're going to do an audit. And Mr. Russo mentioned this last time, that they would want to talk about the audit on an appeal on standing.

Well, now we're getting deeper into the facts. And we would want to show that the audit can't save them because, first of all, as Mr. Tyson himself readily pointed out in the September hearing, our right to vote is not a right to an election outcome. Our right to vote is to have our vote counted.

An audit is only on election outcomes. It has no bearing and cannot determine whether any vote is counted,

particularly our clients'. And so that is another thing that we would want to develop, that the audit can't save them there. And even if the audit somehow could do something of relevance, we would want to point out that the audit here is not robust, it is not reliable, it is not a risk-limiting audit, for example. And those are disputed facts.

The other way that this gets all bound up together is another primary argument they make is they say, well, we can't rely on anything with the DRE system for standing. Right? We can't rely on the fact that the DRE system was hacked twice by Logan Lamb. We can't rely on any of the vulnerabilities. We can't rely on the fact that the State itself acknowledged that the DRE system needed to be scrapped as a basis for our standing argument because they say they are two fundamentally different systems.

Well, Your Honor may recall that Dominion produced an email that came to light where Michael Barnes told the counties to use the USB drives they had used with the DRE system with the new BMD system. The State disputes whether that actually happened.

Again, we need discovery to figure out what actually has happened on that. We would want to develop a record to show that the vulnerabilities and the hacking that occurred with the original system -- that does have a spillover effect. And we think there are other ways that that happens.

Ultimately their argument to us is our injury is entirely speculative because we just imagine that there are vulnerabilities with this system that can affect our clients in some way.

And, you know, we're in a public hearing, so I'm not going to get into specifics. But as Your Honor knows, we have looked at this in detail with an expert. That analysis is ongoing, and we are -- we will be prepared at the end of discovery to give Your Honor a presentation that shows that our case is very far from speculative, that there are very real issues with this system that present real and imminent harm anytime our clients have to use it.

The last point to make on this is: Their other argument is to say, well, there is no harm to you from the BMD system because you have the option to vote by absentee ballot. Well, first of all, the law is well established that the opportunity to turn to absentee ballot doesn't vitiate standing.

But even if we were to just assume that for the sake of argument, Your Honor may recall that Donna Curling, my client, tried to do that with the old DRE system. She tried to vote by absentee ballot years ago. She didn't know until we got into this lawsuit -- filing this lawsuit is the way that she learned that she had been disenfranchised in that election because the State came along and said, well, Donna Curling

didn't even vote in that particular election. That was the first that she had ever heard. And were it not for this lawsuit, she never would have learned that she had been disenfranchised in that because her absentee ballot for some reason just wasn't processed.

We know in the current climate that was a big problem in the last election because of mail issues and the volume of absentee ballots that were submitted.

So the bottom line point here is: All of the arguments the State wants to make on why we don't have standing -- they all go to the very core of our claims. It is all bound up together. And so there is really no way to sever it.

The last thing, Your Honor, is: I just direct your attention to the recent Rose vs. Raffensperger decision from Judge Grimberg. And I think Judge Grimberg really interprets *Jacobson* exactly right. The State argued the same thing there, that there was no standing and the case should be dismissed on the motion to dismiss stage because there is no standing. And they cited *Jacobson*. And Judge Grimberg says, no, no, no, you are reading *Jacobson* way too broadly. Because in *Jacobson*, that went to a trial on the merits. There was a bench trial. There was a complete evidentiary showing.

And what the Eleventh Circuit found was at trial after full discovery the plaintiffs failed to prove up their

allegations that they were relying on for standing. So it wasn't simply the Court of Appeals saying we have looked at this and this should have died on the vine at this motion to dismiss stage because the allegations were never sufficient.

The Eleventh Circuit said you had an opportunity to prove those up and you didn't, you did not come forward with evidence. And that is -- so Judge Grimberg concludes and what *Jacobson* actually says is you are going to have an opportunity to prove up standing through discovery and, if you don't prove up your allegations, then you lose.

And so there's just -- I like Mr. Brown's point. There is just no basis to carve off standing and particularly in the way that the defendants want to litigate it and present that on some sort of truncated record.

It will be prejudicial, and we don't think it is --

THE COURT: Well, I guess my question is a little different. Or maybe it is not. But -- because I know that the State has a host of different levels of defense on standing. And obviously I have addressed them before.

My concern has to do more with what makes your clients different and specifically injured as opposed to the general public and that aren't they just basically prototypical voters. And if this -- I mean, everything that you have put forth might be 100 percent true.

But then is it an injury -- a legal injury for

purposes of litigation, or is it one that is something that ought to be presented to the legislature? Because it is not a classic sort of -- they are not injured in a way that is different.

That was what I was trying to get at and why I offered to have a hearing if you had some -- something in particular that I should be considering so that I would feel comfortable about proceeding.

I'm happy you are comfortable about proceeding with things. But it is a lot of work on the Court's part. It is a lot of public resources. And if we're just going to end up at the Eleventh Circuit saying this is no -- this is no different than any other voter and that there is no particularized harm to these specific voters -- and I'm just trying to get a notion of what that is more specifically at this point.

I don't have any, you know, doubt that people -- that it impacts the right to vote. But I guess the thing is that there are a variety of First Amendment cases that also, you know, obviously impact other voters that somebody is standing in place and they are having their -- and in some ways, it is impacting their right to get on the ballot or to pick the person they want on the ballot or the *Anderson* case but -- and arrays of that.

And I think, you know, there are ways in which *Bush vs. Gore*, even though the court said it wasn't precedential,

the Supreme Court simply created some of this -- may itself have created confusion with this because, you know -- because they did intervene.

But, anyway, that is what I'm asking you about.

MR. BROWN: Your Honor, our position is that the -- initially we as a legal matter don't accept the general proposition that if the state disenfranchises everybody it doesn't disenfranchise anybody. And we think that all that is often repeated, that sort of dictum. We think that is the political question doctrine law leading --

THE COURT: The political?

MR. BROWN: The political question cases sort of bleeding into the actual injury question in a way that if you really look at the case are unsustainable.

All of the -- even the one man, one vote cases go all the way back to *Baker vs. Carr*. Depending on how you characterize the plaintiffs' injury could be characterized in such a way that affects a broad amount of people. And the argument could be it is so many people let the legislature decide, an argument that was rejected in the bill of rights in *Marbury vs. Madison*.

So our position is that the -- that our case that is in our causes of action straight into Anderson-Burdick, Common Cause -- the Common Cause case that was cited with approval on all of these Eleventh Circuit cases and fits also within Judge

Pryor's decision in *Jacobson* where he specifically cites -- string cites cases, Anderson-Burdick cases just like ours, in which he says, of course, none of those cases are a problem from a political question standpoint or from an injury standpoint, from a standing standpoint.

And so we -- now, getting back to the practical question, Judge, although we think there is also established factually individual injury, whether it is because of the screens or because of privacy violations or because of organizational standing -- and we only need one plaintiff to have standing -- we think that it may be most efficient to address that particular issue in further briefing rather than having an additional evidentiary proceeding on that issue, if that makes any sense.

THE COURT: And how would you -- what are you suggesting? I'm sorry.

MR. BROWN: Well, Your Honor -- well, it seemed like from your order on Thursday the one option would be to brief the additional issues rather than having an evidentiary hearing, and that might be the best option.

THE COURT: Well, if you are saying there is one or there is two versus ten who have standing, then wouldn't I need to know what distinguishes these individuals and is it in the record?

MR. CROSS: I'm sorry. What was your question? I

apologize. It froze for me for a second.

THE COURT: If Mr. Brown is saying you can proceed even if you just have one plaintiff who has standing or perhaps one for each side, wouldn't I have to know something about that individual or else you would have to point out in the record what distinguishes their experiences?

MR. BROWN: You might, Your Honor. The various types of injury that we have in the record already range from people that are trying to vote absentee to people with concerns about ballot privacy to a more general -- I wouldn't say generalized but a more general fear -- more than just fear that the vote is not going to be counted in much the same way that these other cases have adjudicated those.

We -- in terms of pointing to evidence, we don't -- we don't see it as being necessary to have a full-blown evidentiary hearing. And I would note, Your Honor, that the cases that you cited and that -- well, what is the name of the one? The 2000 case. *Bischoff* and the cases that it cited procedurally were sort of the reverse. Those were cases where the trial court reached out and dismissed cases on the standing.

THE COURT: Right.

MR. BROWN: And so we don't -- we don't want you to do that, of course. But I don't think that compels you to make factual findings now, in addition to what we have already put

forward.

And that under the cases cited by *Bischoff* that we need to put it altogether into one -- you know, they are all intertwined. And it is more efficient to try it all at once. And there is no requirement that you decide standing in advance. There is, of course -- once we try it, you'll have to make findings of fact that establish our right to permanent relief.

MR. CROSS: Okay. Your Honor, the one thing I would add is -- I agree with Mr. Brown. I don't -- I think too much is getting read into these recent election cases, which were post-election election outcome cases and this idea that if the harm could be the same to more than one voter no voter has constitutional standing to bring a case.

I just -- that is not and has never been the law in voting rights cases nor could it be. I mean, it is not hard to imagine a lot of different ways in which -- I mean, if you had an election system, for example, that actually did have some sort of algorithm that rigged the result, it affects everyone the same way but there is no way anyone would ever say that that is a constitutional system and your only avenue to challenge it would be to convince the legislature, particularly if that system adopted by a legislature and the algorithm favors the party in power. You would just be stuck. And that cannot be the law.

And when you look at the voting rights cases, many of the cases we look at over time, multiple voters are impacted in the same way. The question is whether the voter has a particularized harm. In these recent cases, there were people coming forward and they just didn't like the outcome of the election. And that is what their cases were about. And they were arguing things -- they would say we have a collective harm.

I mean, literally I think in the Lin Wood case -- in one or more of those cases, the argument was collective harm. That is not our case. We're not arguing that.

Donna Curling, again, will give the perfect example, I think, as someone who tried to avoid the system because of the lack of confidence she has -- and, again, the Supreme Court -- I think it has always been known. Even undermining voter confidence can be sufficient for standing. But she tried to avoid it and found out she had been disenfranchised. So that is a very particularized harm.

And, you know, also the vulnerabilities we're talking about, we don't know exactly how they will play out in any given situation. We want to make a presentation to Your Honor for Dr. Halderman to talk you through that so you understand how the harm actually can affect individual voters and in particular our clients. We have to complete discovery on that.

Your Honor, the last point I was going to make before

I forget, I do -- you know, I'm not an appellate lawyer. I talked to our appellate team about this. For what it is worth, there is significant skepticism that even if Your Honor were to certify this for an interlocutory appeal that the Eleventh Circuit would take it.

So part of the concern we have is we could spend a lot of time and money on a standing-focused proceeding and then you certify it and then the Eleventh Circuit, consistent with what we think they intended in *Jacobson*, just as Judge Grimberg interprets that decision, will send it back and say it is just too soon.

And there are a lot of reasons for that. In our particular case, again, you know, respectfully, Your Honor, if that happened, we would have to make the argument to the Eleventh Circuit that it is procedurally defective, that we should get an opportunity to do this altogether. And so then it goes up on appeal with that procedural argument.

The Eleventh Circuit we think will likely look at that and say this should be presented at the end in a trial. But also we think the Eleventh Circuit may not want to open the door to courts sending up standing issues at the early stage. They may not want to set that precedent because it is extremely unusual to do that.

THE COURT: Well, that assumes I rule for you. I mean, the thing is I could rule against you. And then it is --

and then it is the end of the case.

I mean, basically, the Court always reserves the right to reconsider its ruling. So then it is the end of the case, and you appeal, and they send it back to me. Then I'm wrong. But that is --

MR. CROSS: Right. That is true. Obviously if we lose, then we would be the appealing one and then they may send it back to you.

We think at that point they would send it back and say that the decision was premature because we should get to present everything. Obviously understood.

But if Your Honor finds that there is standing and it certifies that for appeal, we just -- we don't think we will have really gained anything. Frankly, even if the Court of Appeals looks at it and affirms the ruling, all the Eleventh Circuit is saying is we are affirming as of the record right now.

The defendants will still -- I mean, I hate to admit it. But the defendants will still have their standing arguments because the case will then go to a full trial on the merits.

We certainly will argue that standing should be a resolved issue to us at that point. There should be at least some sort of collateral estoppel on that. I don't know whether that is right because we haven't seen a case that deals with

this yet. And it is hard to know how the Eleventh Circuit will write their decision.

Our fear is what the Eleventh Circuit would likely say at most is we'll affirm it now but there is still -- standing is a live issue, as Your Honor points out, at any point in time.

And so I'm not sure we're buying any kind of certainty even if it were to play out in that way. Because certainly the defendants are not going to waive the standing arguments and you'll have to address it again at trial.

MR. McGUIRE: Your Honor, may I also attempt to address -- earlier you asked what makes our clients different.

THE COURT: Right.

MR. McGUIRE: You know, I think the Eleventh Circuit has used this generalized grievance phrase as a way of tossing some of these cases. But there is a difference between an undifferentiated generalized grievance and injury for purposes of standing that actually affects clients in a particularized way.

And the fact that an injury might be individually experienced by a large number of people does not -- does not mean that any one person is not injured for purposes of standing.

And I think the Eleventh Circuit -- to the extent that their holdings point in that direction, I think it is

contrary to what the Supreme Court itself has directly said on this. In *Spokeo vs. Robins* in Footnote 7, the court said, the fact that an injury may be suffered by a large number of people does not of itself make that injury a non-justiciable generalized grievance. And here -- and that kind of makes a lot of sense because if the State just does something that is wildly unconstitutional it would create a dynamic where the more people they affect the less -- the fewer people have standing to challenge to the court, which would be backwards from what would make sense in a justice system.

So we believe the record has established at least prima facie evidence that there is a -- that there are particularized injuries to both the Coalition as an organization and to each of the individual plaintiffs.

And as you said, there hasn't yet been any credibility challenge that would call into question those sworn affidavits. So we believe the record as it currently stands, you know, combined with the way the Supreme Court has addressed this issue of the generalized grievance -- we believe standing is pretty solid at the moment.

And we certainly could take the time to elaborate on it. But we believe the Court already has what it needs to show that the individual and organizational plaintiffs have particularized injuries, albeit wildly shared, no doubt. But that doesn't deprive us of an injury for purposes of standing.

THE COURT: Okay. I assume somebody from the State wishes to speak?

MR. TYSON: Yes, Your Honor. Good morning. Bryan Tyson for the State.

I think -- I don't have a whole lot to add. But I think initially I can just say I think we found at least a point of agreement here. The State doesn't believe an additional evidentiary hearing on the issue of standing is going to be helpful. And apparently from what I have heard this morning, the plaintiffs are in agreement with that.

I think the key issue is what Your Honor has identified. Like the plaintiffs in this case, Mr. Wood and Ms. Powell in their -- the complaints were claims they were packing of the system. And the court dismissed those claims because they were the same as every other voter in Georgia.

And to the point that there are no other remedies, well, there are a whole host of remedies available in superior court related to election. The question here is particularly is there a federal claim on this.

And to Mr. Cross' point about *Jacobson* and trying to say, well, we have to have a trial to get there, there were many bases on which the *Jacobson* plaintiffs didn't have actionable claims. But there was several that had nothing to do with the evidence. It was the nature of the complaint. There is no interest in the outcome of an election.

So *Rose* and the voting rights cases that have been discussed were specific vote dilution claims based on the configuration of districts. And there was a very well-developed precedent on that but even a case like *Gill vs. Whitford*, to get all the way to the U.S. Supreme Court and say, you know, there is not standing because there is not any issues here. I think, again, we're back to they have to have a particularized injury that is not just a generalized grievance.

So from our perspective, since we are still waiting on the Eleventh Circuit to issue its decision on the jurisdictional question on the appeals of what all it is going to take, it seems to make sense to us that we're going to address standing in the context of those appeals if they -- if they take both of them.

And from a conservation of resources standpoint, if they are going to hear those issues, it doesn't make a whole lot of sense in our minds to continue to conduct discovery, kind of continue litigating these issues here if they are going to resolve that question.

We want this case to get to trial so we can dispel the cloud over Georgia's elections. So I want to be very clear about that. But if the Eleventh Circuit is already going to be ruling on these same issues, I think we need to consider that in terms of the ultimate resources.

Because I think if we want to get to an evidentiary

question, there is a -- there is a whole host of issues we would have to deal with in terms of the discovery we serve that has not been responded to. And, as Mr. Cross and Mr. Brown both discussed, they really from their perspective have to get into the merits of their claims of the hacking of Georgia's election system to show that they have or believe to show they have an injury that is still -- even if they get through all the processes, which we don't believe they will be able to, that alleged injury is not concrete and particularized because it is shared by all Georgia voters. And that is ultimately the question here.

And I think then maybe -- as Mr. Brown alluded to, maybe there is a question about the Coalition diverting resources. We submit that even if that is the case they are still -- we are still in *Clapper* land at that point. If a diversion -- I mean, clearly the plaintiffs in *Clapper* were diverting resources. But it was only because of the speculative chain of possibilities. So we're, again, not at a point where we can have and deal with those types of questions.

So ultimately, Your Honor, we think that the most logical thing is to let the Eleventh Circuit deal with this question. But barring that, I think your suggestion of -- even considering that there is a record and entering a new order that can then be certified is probably our best way to get to an appeal and have the Eleventh Circuit hear that because

ultimately this is the problem. There is not the concrete and particularized injury as to the claims, not just as to the evidence.

So I am happy to answer any other questions, Your Honor, but I think we have kind of hit the nail on the head in all the discussions so far.

THE COURT: It didn't look like you-all had -- that there was -- is there a time frame for briefing at this point in your -- because I know obviously that there was about the question of taking the interlocutory appeal.

But has there actually been full briefing on the --

MR. BROWN: No, Your Honor. What it looks like right now is the court in the Eleventh Circuit asked a jurisdictional question about the appealability of Your Honor's ruling on the scanners because your ruling on the scanners that had been appealed looked like there was something more coming and, in fact, there is or might be.

And so what the Eleventh Circuit said is, in light of the -- what looks like an incomplete ruling on the scanners, do we now have jurisdiction? So we went in -- I can't remember what the State said -- we said no, you don't, because there may be another ruling coming from the trial court. And that decision would be appealable.

Separately, they have consolidated that case with the Poll Pad case. Consolidation doesn't change any of these

issues that much. It will just be the same panel. There is no jurisdictional challenge to your order on the Poll Pads.

So in any event, they will -- it is not clear -- no offense, Your Honor. It is not clear who is waiting on who with the Eleventh Circuit. I'm not -- I don't know what they are waiting on. Of course, you know, they don't tell us what they are thinking and certainly haven't told us in this case what they are thinking, including their reversal of your 67-page opinion on the Poll Pads.

So we don't know what they are thinking on that. But we do know if they do decide standing it will not even reach the BMD claims. And that is -- I mean, we think all of the claims are important, of course, Poll Pads, scanners.

But the BMD issue is if not the major a major appeal. If we should establish standing on appeal, the first thing the State defendants will say when it comes back down is, yeah, it doesn't tell us anything, Judge, because they didn't address standing of the main BMD claims.

So there is no point in waiting on the Eleventh Circuit. Who knows what they are going to do or when. But we do know that when they do issue a ruling it will not address the main standing in this case.

And so we think that it is not going to be helpful to certify the motion to dismiss for the reasons I said. No point in waiting on the Eleventh Circuit for the reasons I have done.

And that I think we agree that having a separate trial on a severed standing issue is incomplete.

The other thing that -- I mean, the *Jacobson* case clearly distinguishes our case and Anderson-Burdick cases in a long citation of cases. And we may -- I'm not -- I'm not asking for an additional brief to have to file. But if there is something that we do -- we can brief, we'll be happy to do so. But the *Jacobson* case is actually very good authority for us proceeding right now to trial on the merits.

MR. TYSON: Your Honor, I'll just add: In terms of once the Eleventh Circuit answers the jurisdictional question, that will then determine where we go.

We did raise standing issues in the Poll Pad appeal as well. So that is also before the Eleventh Circuit. I'm assuming the arguments will be basically identical in terms of the concrete and particularized injuries. We will get that ruling eventually. I don't know when we will get that from the Eleventh Circuit. When they rule, that will set the schedule for briefing.

THE COURT: All right. Why don't we just take a pause for a few minutes. I'm going to talk to Ms. Cole off the -- offline.

Ms. Cole, I'll give you a call on the other -- on my phone. All right?

MR. CROSS: Your Honor, could I -- just quickly

before we pause, I did want to echo Mr. McGuire's point because I will say that Mr. Tyson did not respond to that. And I just don't see how anyone could make the argument that Mr. Tyson is making about this generalized grievance in light of Footnote 7 in the *Spokeo* Supreme Court decision.

And, again, we think the Eleventh Circuit case law is being misinterpreted here. But even if it is being -- even if it is right, it is directly at odds -- I mean, completely at odds with what the Supreme Court said in *Spokeo*.

The fact that an injury may be suffered by a large number of people does not of itself make that injury a non-justiciable generalized grievance. It even gives the example of mass torts.

Particularized injury, the Supreme Court says, all that is required is it is personal -- it is the experience of a person in an individual way. Lots of people can have that.

THE COURT: And what about *Gill*?

MR. CROSS: I'm sorry. What about *Gill*?

THE COURT: Yes. Just raising the issue of simply is it, I guess, ultimately a political question in this context. Yes.

MR. CROSS: I guess I don't see that there is a political question for us in the way that we're presenting our particularized harm here, Your Honor. It is based on particular facts about the system. It is not a political

issue.

MR. BROWN: And the other political question issue is whether or not there is manageable judicial standards. And that was the problem in *Rucho* or *Rucho* (different pronunciation), the political gerrymandering case. And that both *Jacobson* and *Rucho* dealt with entirely different issues. *Jacobson*, of course, is the order that candidates appear on the ballot. And *Rucho* was political gerrymandering.

Judge Pryor in the *Jacobson* case said we're not talking about Anderson-Burdick cases in terms of political question. Because in Anderson-Burdick cases, the plaintiffs have identified a burden, a discrete burden, which if removed will address their constitutional grievance, a feature that is not found in the political gerrymandering cases or the ballot sequence cases.

Here we have identified particular burdens. Screens are too big. The BMD is not reliable. It is vulnerable. It is not verifiable. The scanners don't count votes. And in *Jacobson*, here Judge Pryor says -- in distinguishing the Anderson-Burdick cases comes down and says, and to state the obvious, the statute, that is, the statute involved in *Jacobson*, certainly does not create the risk that some votes will go uncounted or be improperly counted.

So this is just William Pryor saying if you have a case in which there is a state law or state practice that

creates the risk that some votes will go uncounted or not be properly counted you have standing and there is no political question. And that is precisely Your Honor's analysis not only in the most recent -- in the order on the BMDs but your order on the DREs. That is exactly the way Your Honor analyzed it. And that law has not changed since you ruled in either of your prior decisions.

And so if a particular -- if a plaintiff -- if an individual plaintiff -- if it was Donna Curling or any of our clients, if there was a risk that their vote would go uncounted, that is a risk that every voter shares because you don't know if you're going to be the one that is not counted.

And so the defendants' argument would apply exactly to the situation that Judge Pryor has said is not a political question. And it turns exactly on the misreading of the generalized grievance that is decimated by Footnote 7 in *Spokeo*.

MR. TYSON: Your Honor, just on that very briefly, I think the key point is a lot of people is different than everybody, Number 1.

Number 2, I think the Eleventh Circuit in *Gardner vs. Mutz* also discusses this issue at length in terms of generalized grievances as opposed to concrete and particularized injury.

So I believe the point -- I think you have got the

area of law well. But I just wanted to make those points as well.

THE COURT: Okay. All right. All right. Well, I'm going to take a few minutes, as I said, and talk with Ms. Cole. I'll get back to you.

So just hold on. And you can mute yourself so you can talk among yourselves as you see fit. And we'll come back shortly. Okay?

(There was a brief break in the proceedings.)

THE COURT: I'm just going to talk so maybe we will see that we are here. Mr. Cross is there, Mr. McGuire, Mr. Tyson.

Are you ready to begin?

Okay. I think we have -- you have done a lot of briefing before on standing many times over. And so I'm not looking just for a rehash of everything in the past. But I do think this whole issue of is it just a generalized concern, is there a particularized injury, is -- or is there a particularized injury and is it just so general to all voters that it -- can it or can it not basically be a basis of standing is something that was not specifically really zoned in on in some of the other briefing.

I mean, there is certainly -- I'm not saying it wasn't mentioned at all but it was -- and particularized injury was but not sort of in this context that has sort of become --

because of all the litigation over the 2020 election, it became so dominant not just in our circuit but elsewhere as well.

So I think it would be helpful for the Court to get briefs from the parties that specifically focus on that question that we have been addressing today and that has given the Court obvious thoughts.

Because you have heard each other's arguments, I don't know that we need to go back and forth. I think that just needlessly delays the process. You know what -- obviously the plaintiff has talked a lot more than the defendants. But Mr. Tyson still has laid out his legal theory.

And if there is -- so if I find that there is something I still think is confusing to me or that I would like a response on, I can ask you for it. But it seems to me to make more sense to have the parties submit a brief in ten days and let me see what you've got and see whether it is going to address -- how it addresses my concerns and focusing on the issues that I have tried to focus on as a -- specifically in this hearing.

And I think that would be helpful. This has been helpful too. But I think it would be better to just simply at this juncture for me to get a brief with citations to some of the cases you have been talking about and let me put this together into the context of whatever we have done before.

But don't rehash everything you have ever done. All

right? That is not going to be helpful. It is kind of -- it should be to all of you also having either been involved in the litigation over this cycle or watched it closely what the concerns of the Court are.

MR. BROWN: Thank you, Your Honor.

MR. CROSS: Your Honor, I just want to make sure I understand what you are looking for. Are you looking for briefing just on a pure legal question regarding sort of what case law means on this issue of generalized grievance?

THE COURT: I'm asking you this in the context of the allegations in this case and the evidence in this case.

MR. CROSS: Right. Right. So you are asking -- essentially what you are asking us is to brief if we have standing under this generalized grievance standard and so we should put in evidence on that; right?

THE COURT: You can do that. That is one way of doing it. I mean, you are going to -- obviously you told me you are going to be talking about *Spokeo* and the footnote. And you'll probably do some -- just tell me to rely on *Spokeo* and the footnote.

But I guess it is -- obviously it is the meshing of it all because it is not just a theoretical principle and how you want me to apply it here. I mean, we do have a real record in this case.

MR. TYSON: Your Honor, if Mr. Cross is planning --

I'm sorry.

THE COURT: Yeah.

MR. TYSON: I was going to say: If Mr. Cross is planning to put in evidence, I think maybe we would need some way to respond to that.

Obviously, we haven't taken the depositions of the plaintiffs yet. We were trying to get documents first. We weren't able to cross-examine them in the hearing.

So if there is going to be an evidentiary component, we might need to have something that is not just simultaneous briefing just so we have the ability to respond.

But I think, like he said though, I don't see the evidence is going to make a difference because it is the nature of the injury. But just not knowing what they maybe wanted to put in, we may need some ability to respond to that.

MR. BROWN: Your Honor, if I may, what we were planning in response to the issues was a briefing on the law on that point that you identified as applied to the current record in the case and that we anticipate being able to show based on the affidavits and the other evidence that we meet the standards and to not open it up into some prolonged evidentiary back-and-forth and that we could probably do that if each -- we would write separately. So maybe 15 pages per plaintiff group.

Would that be in line with what you were anticipating?

THE COURT: That's fine. That's fine.

MR. BROWN: Okay.

THE COURT: Why don't we do that. Then let me just say automatically everybody -- any party can write a five-page response. But you -- but the five-page response has to be submitted in five days. And consecutive days, not -- so -- so -- because, you know, the rules do something different often when it is less than ten. But, anyway, five pages, less than -- and five days from the date of the submission. And then anyone can do that.

MR. BROWN: Okay. Thank you, Your Honor.

MR. TYSON: Your Honor, one other issue -- thank you for that. I think that works.

I know that we also are in a situation where we have pending discovery with the plaintiffs, they have pending discovery with us.

Do you want us to continue -- it doesn't seem like it is worth continuing back and forth on meeting and conferring on discovery. But I wanted to clarify kind of what you would like us to do that on since we have all the pending items out there.

THE COURT: How much do you have?

MR. TYSON: I mean, we have served a relatively significant number of document requests that have been objected to and interrogatories and requests for admission. And I know Mr. Cross and the Coalition folks have quite a bit that they

have served on us that we -- that are going to require a lot of work on the Secretary's office. And we have been trying to get through the election obviously before beginning that process of assembling the search terms and things like that.

So I just -- I just wanted to clarify: Do we need to have our clients work on that? Or, you know, what should we do in the meantime? Because we both have, like, pending items with the other that we would have to meet and confer about and then bring discovery statements to you.

THE COURT: Why don't -- why don't you do that -- begin to talk after all of the -- after the 15-day period is over.

MR. TYSON: Okay. Thank you, Your Honor. That will work.

THE COURT: Yeah. Why don't you just start doing it that way.

MR. McGUIRE: Your Honor, I think we had some audio issues on our end judging by what I'm hearing.

So just to reiterate, our brief -- our plaintiffs' brief would be due in ten days, which is Friday the 12th, 15 pages per group and then within five -- and the State's brief on the same day. But then within five days later, not skipping weekend days, max five-page response?

THE COURT: Right.

MR. McGUIRE: Thank you.

MR. BROWN: Thank you, Your Honor.

MR. CROSS: Your Honor, two quick things. I did want to clarify one thing. Mr. Tyson mentioned earlier he thought we were in agreement on not having an evidentiary hearing on standing.

Our position was and is we just don't think there should be a standing-only proceeding. But I did want to reserve, once we see the briefing, if we think an evidentiary hearing is helpful for the Court, we may come back on that. But maybe it won't be needed with the further briefing.

THE COURT: You can notify us of that once you get -- see what they submitted also.

MR. CROSS: That was the idea, Your Honor. I just didn't want to leave the impression that we were waiving that.

The last thing, Your Honor, is: Given the pace at which we are moving on the BMD stuff and the possibility we may be dealing with an interlocutory appeal, we would appreciate Your Honor's attention to the fee request at the Court's earliest convenience.

It is a substantial sum, and I won't go into the merits here. But it looks like we're going to be a long time before we get to a resolution on the BMD claims. So if we could address that, we would appreciate it.

THE COURT: Okay. All right. Can you remind me whether the last time your clients provided affidavits in

connection with the DRE claims and not -- or were there affidavits also in connection with the -- with the BMD amended claims?

MR. CROSS: There were new declarations supplied regarding the BMD system.

THE COURT: All right.

Okay. Anything else for the good of the order?

Okay. All right. We'll look for the submissions. If we need to talk to you, then we'll let you know.

Okay. Thank you very much. I hope everyone is well and your families are well. I neglected to start that way. I always am concerned about everybody and how each of your teams are. I know it has been a very challenging time.

And, Mr. Tyson, are things at all calming down at the State?

MR. CROSS: You are muted, Bryan.

THE COURT: You are muted. Mr. Tyson, you are muted. I can't hear you.

MR. TYSON: I apologize, Your Honor. I think my phone cut out.

There is plenty to do. It is a little bit slower. But as soon as the legislature acts, I am sure we will have plenty more to do as well. So we will see.

THE COURT: Well, it certainly seemed like Georgia was the center of the world for a while. That's a little

exaggeration, but it did certainly -- there was a lot going on.

MR. BROWN: We have always believed that Georgia is the center of the world, Your Honor.

MR. CROSS: Now everybody knows.

(Unintelligible cross-talk)

MR. CROSS: Everybody knows where the Big Chicken is now.

THE COURT: For sure.

Very good. All right. Good to see you-all. Take care.

MR. CROSS: Thanks, Judge.

MR. TYSON: Thank you, Your Honor.

(The proceedings were thereby concluded at 12:13 P.M.)

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 43 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 2nd day of February, 2021.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT